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Case Number 438,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANKLIN BROWN,	)	
	)	
Plaintiff Below, Appellant	)	No. 438, 2016
	)	
v.	)	
	)	On Appeal From The Court of
RITE AID CORPORATION,	)	Chancery of the State of Delaware,
	)	
Defendant Below, Appellee	)	C.A. No. 11596-VCL

APPELLANT'S OPENING BRIEF

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Dated: October 10, 2016

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NATURE OF PROCEEDINGS

For the past thirteen years, beginning nine months before Franklin Brown's criminal trial commenced in September 2003, Rite Aid Corporation ("Rite Aid") has successfully avoided its statutory and contractual obligations to indemnify Brown for his criminal defense costs arising from his service as a director and officer of the corporation. To derail Brown's 2003 lawsuit in the Court of Chancery, in which Brown sought to compel Rite Aid to resume paying his criminal defense costs, Rite Aid intentionally and wrongfully filed and pursued a separate action against Brown in Cumberland County Pennsylvania in clear violation of a permanent injunction order entered in the United States District Court for the Eastern District of Pennsylvania on August 16, 2001. While concealing the existence of the permanent injunction order, which Rite Aid's attorneys helped draft in connection with the settlement of class action and derivative litigation underlying Rite Aid's 1999 restatements of income and Brown's criminal prosecution, Rite Aid persuaded the Court of Chancery to defer to the Cumberland County court. In stark contrast to Brown's co-defendant, Franklyn Bergonzi, who successfully compelled Rite Aid to resume mandatory advancement of his criminal defense costs in 2003 in the Court of Chancery, Brown was denied advancement of his criminal defense costs by the Pennsylvania court.

Forced to self-fund his criminal trial, direct appeals, and post-trial proceedings, with devastating consequences for himself and his family, on October 8, 2015, Brown returned to the Court of Chancery pursuant to Rite Aid's by-laws that he "may apply to Court of Chancery for indemnification." This appeal arises from the Court of Chancery's dismissal of Brown's complaint for indemnification upon the determination that Brown's claim is barred by the equitable doctrine of laches.

SUMMARY OF ARGUMENT

The court below erred as a matter of law in four respects:

1. The court erred by concluding that Brown's indemnification claim accrued on January 10, 2011, rather than on November 10, 2014. A cause of action for indemnification accrues when the party seeking indemnification can be assured that the claims against him have been resolved with certainty. *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 919 (Del. 2004). Although the U.S. Supreme Court denied Brown's petition for writ of certiorari on January 10, 2011, this did not represent the final chapter of Brown's criminal prosecution, and Brown could not then have been certain his criminal case was resolved with certainty. Because Congress and the U.S. Supreme Court have expressly provided that a motion under 28 U.S.C. § 2255 is a continuation of the movant's criminal case in the sentencing court and not a separate action, and because Brown's Section 2255 motion was his only opportunity to assert certain vital Constitutional errors, he could not be confident in the finality of his conviction until the U.S. Supreme Court denied his second certiorari petition on November 10, 2014. The court below erred by concluding that Brown's criminal action was finalized with sufficient certainty upon the completion of his direct appeal, ignoring that a Section 2255 motion is a further step in the movant's federal criminal case, and that unlike a federal habeas

petition, such a motion attacks the conviction and sentence, just as a direct appeal does.

2. The court erred by concluding that the indemnification claim was subject to a three year statute of limitations rather than a twenty year period. Generally, claims for indemnification are subject to the three year statute of limitations provided by 10 *Del. C.* § 8106. However, in 2014, the legislature added subsection 8106(c) and expanded the time to bring a cause of action on a contract involving more than $100,000 to the time provided in the contract or, if the contract allows for an indefinite period, then to twenty years. Because the indemnification provision in Rite Aid's certificate of incorporation allows a claimant to bring suit against the company "at any time" after an indemnification claim remains unpaid for 30 days, the twenty year period under Section 8106(c) applies. Having decided to apply the analogous statute of limitations, the court below was required to apply the unambiguous statutory mandate. *Zambrana v. State*, 118 A.3d 773, 775 (Del. 2015)("[c]ourts have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions.")(citation omitted)(alteration in original).

3. The court erred by failing to find that the analogous statute of limitations was tolled by the action filed in Pennsylvania's Cumberland County Court of Common Pleas, Civil No.: 02-4922 (the "Cumberland County Action").

Brown gave timely notice to Rite Aid of his intention to compel Rite Aid to pay his legal expenses by filing a claim for advancement of those expenses in the Court of Chancery on December 3, 2003. Rite Aid responded with the Cumberland County Action, in which it sought *inter alia*, return of funds previously advanced to Brown and a judicial determination that Brown's right to indemnification was terminated by his criminal conviction in September 2003. The Cumberland County Action remained pending when Brown's criminal case reached its final disposition on November 10, 2014. Because "the filing of an action will commence the tolling of the statute of limitations… subject to the requirement that the plaintiff diligently seek to bring the defendant into court and subject him to its jurisdiction," *Russell v. Olmedo*, 275 A.2d 249, 250 (Del. 1971), Brown timely filed this action for indemnification on October 8, 2015, *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013).

4. The court erred by finding that Brown's claim for indemnification was barred by the equitable doctrine of laches. The court below rigidly applied an analogous three-year limitations period despite the existence of "unusual conditions or extraordinary circumstances" that justify not doing so in this case. Where unusual conditions or extraordinary circumstances exist, this Court has indicated "the analogous period of limitations ought not to be the measure of whether a litigant unreasonably delayed in commencing his action."

IAC/InterActiveCorp v. O'Brien, 26 A.3d 174, 178 (Del. 2011); *Levey*, 76 A.3d at 772.

STATEMENT OF FACTS

A. Brown's Indictment, Conviction, the Bar Order, and 28 U.S.C. § 2255 Motion

Franklin Brown faithfully represented Rite Aid for decades, from the inception of Rite Aid's business in 1962 until his retirement in 2000, as the corporation grew from a single store to a national retailer operating thousands of stores. A309-10. When Rite Aid became a publicly-traded company in 1968, Brown was appointed to serve as its Secretary and General Counsel. *Id.* He thereafter continued to serve the corporation in various capacities, including as Executive Vice President and Chief Legal Counsel until 1996, and thereafter in an emeritus capacity as Vice Chairman of the Board of Directors, until his retirement in 2000. A310-12.

When Rite Aid's founder stepped down as chief executive in the mid-1990s, he was succeeded by his son, Martin Grass, who instituted an aggressive expansion program. A313. Four years after Grass assumed control of Rite Aid, it was discovered that his expansion schemes had not been so successful as he had initially claimed, requiring the company to issue two significant financial restatements in 1999. A314-15. These restatements caused a precipitous decline in Rite Aid's stock price and drew the attention of federal investigators. A315. As Rite Aid stated in its July 11, 2000 Form 10-K filed with the SEC, "[t]here are currently pending federal government investigations, both civil and criminal, by

the SEC and the United States Attorney, involving our financial reporting and other matters." A315. The company reported further that "Rite Aid is cooperating fully with the SEC and the United States Attorney." A316.

Class and derivative lawsuits against Rite Aid soon followed in the United States District Court for the Eastern District of Pennsylvania ("EDPA"), in a matter styled *In re Rite Aid Corporation Securities Litigation*, MDL No. 1360, No. 99-cv-1349 (E.D. Pa.). Those claims were all eventually settled on August 16, 2001. A032-59. The settlement orders included a broad release of "Settled Claims," and further included a prohibition on the prosecution of claims for indemnification and contribution against "Released Parties" (together, the "Bar Order"). In relevant part, the Bar Order provided that:

> [T]he Non-Settling Defendants and the Settling Defendants are hereby PERMANENTLY BARRED, ENJOINED AND RESTRAINED from commencing, prosecuting, or asserting ***any other claim, however styled, whether for indemnification, contribution or otherwise***, and whether arising under state, federal or common law, against the Released Parties based upon, arising out of or relating to the Settled Claims[.]

A039 (emphasis added); A053-54. Brown, a Settling Defendant, is a Released Party by virtue of being a former officer and director of Rite Aid. *See id.* at ¶ 7.[1]

[1] Notwithstanding this Bar Order, Rite Aid would soon file the Cumberland County Action against Brown for indemnification.

Brown cooperated with the government's investigations and engaged legal counsel to represent him. A315-16. Brown also cooperated with Rite Aid's own internal investigation. A315. As a result of that thorough internal investigation, Rite Aid's Board included Brown for coverage under the Rite Aid directors and officers ("D&O") liability insurance policy for the stockholder class action lawsuits that were settled. By contrast, the Board directed the insurance company to deny D&O coverage to former CEO Grass, CFO Bergonzi, and President/COO Timothy Noonan. *Id.*

Nonetheless, on June 21, 2002, the same day Rite Aid agreed to a Cease-and-Desist Order with the SEC, Brown (along with Grass, Bergonzi, and Noonan) was indicted and charged with thirty-six criminal counts, under federal law including conspiracy, false statements, and obstruction of justice. A317; A060-160. Brown's trial was set for September 2003. A180. Pursuant to the company's Amended and Restated Certificate of Incorporation, dated December 12, 1996 (the "Charter") (A011), Brown submitted the required undertaking and Rite Aid initially paid Brown's attorneys' fees and defense costs. Rite Aid met its advancement obligations for nearly three years, from the inception of the federal investigations through the end of 2002. A317-320. In approximately January 2003, nine months prior to Brown's criminal trial, Rite Aid suddenly stopped

advancements to Brown. A323.[2] As a result of this cessation, Brown's trial attorneys severely curtailed their investigation, preparation, and presentation of Brown's defense. The withholding of mandatory advancements resulted in an inadequate defense by Brown's trial counsel, including the withholding of many indicia of Brown's innocence from the jury at trial. A322.

Prior to trial, the government dismissed twenty-four of the thirty-six counts in the indictment. A325. Brown proceeded to trial on the remaining twelve counts in September 2003. He was acquitted on one count of wire fraud (which resulted in a judgment of acquittal on a second forfeiture count) (A218; A188), but convicted of the remaining ten counts remaining in the indictment. A302; A186-206.

Immediately after trial, Brown informed his trial attorneys that he desired new counsel for post-trial proceedings, and Brown's trial attorneys informed the government in early November 2003 that Brown was looking for substitute counsel. A359. After the trial court refused to permit Brown to substitute new

[2] Rite Aid's decision to stop advancements costs coincided with the issuance of the Thompson Memorandum (A318-23; A369), which articulated "principles" to govern the DOJ's discretion in bringing criminal prosecutions against business organizations. Among the "principles" outlined, prosecutors considering whether to institute criminal charges against a business organization were to consider, "whether the corporation appears to be protecting its culpable employees and agents[,]" through, among other behaviors, "the advancing of attorneys' fees." A318-19; A171-72.

counsel, Brown appeared for sentencing on October 14, 2004 and received a sentence of imprisonment for a term of ten years. *Id.*; A363. Judgment was entered October 15, 2004, and Brown noted his appeal timely on October 28, 2004. A363.

In 2006, Brown renewed his motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. *Id.* Brown argued that extensive examination, testing, and comparison by his experts of audio tapes of certain critical trial testimony and video tapes "confirmed what Brown suspected all along: the government intentionally withheld exculpatory material from the defense and misrepresented the authenticity of the tapes furnished to the defense and incorporated in the Jury Presentation," and that the newly disclosed portions contained exculpatory material withheld by the government before trial. A363-64.

After a four day evidentiary hearing, the trial court denied Brown's renewed motion for new trial. *See United States v. Brown*, 2008 WL 510126 (M.D. Pa. Feb 22, 2008). Although the trial court acknowledged significant evidence produced by Brown's experts, including their finding that the tapes were not authentic (but were digitally-edited copies re-recorded onto the same analog tapes erasing the original conversations and replacing them with digitally-altered versions) (A364-65), the trial court ultimately concluded that because Brown's experts could not determine precisely which words had been changed, the government did not

submit false evidence or perjured testimony to the jury during Brown's trial. A365; *see also Brown*, 2008 WL 510126, at *26. The trial court noted that Brown's trial counsel was "well aware of the procedure to challenge the authenticity of the tapes before trial," but "never called [an expert on the tapes] to the stand to testify." *Id*. at *8, *24 n.23. Additionally, Brown's trial attorneys "lodged no objection to the admissibility of the tapes, nor did [they] level any accusations against the government of tampering with the tapes or withholding exculpatory evidence." *Id*. at *8; A365. Brown filed a notice of appeal from that order, which was consolidated with his earlier appeals. A365.

On appeal, the Third Circuit questioned whether Brown's attorneys were diligent in seeking evidence of tape tampering, noting the defense "could have and should have developed [Brown's] expert testimony before the trial." *United States v. Brown*, 595 F.3d 498, 511 n.16 (3d Cir. 2010). The Third Circuit affirmed Brown's convictions, but remanded his case for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005). *Id.* at 502; A365. After having a second sentence also reversed by the Third Circuit (*United States v. Brown*, 429 Fed.Appx. 82 (3d Cir. 2011)), in August 2011 Brown was resentenced to time served, with an order to remain on supervised release for a period of one year. A366-67.

While Brown was awaiting the final disposition of his resentencing proceedings, his petition for writ of certiorari from the Third Circuit's affirmation of his convictions was denied by the U.S. Supreme Court on January 10, 2011. *Brown v. United States*, 131 S. Ct. 903 (2011). A366. With the direct appeal portion of his proceedings completed, on November 29, 2011, Brown's new counsel filed a motion to set aside or correct his convictions and sentence pursuant to 28 U.S.C. § 2255 based upon, among other things, the ineffective assistance of his counsel at trial and on appeal. A367. On November 25, 2013, the court denied Brown's Section 2255 motion. *United States v. Brown*, 2013 WL 6182032 (M.D. Pa. Nov. 25, 2013). Brown appealed and on November 10, 2014, the U.S. Supreme Court denied Brown's second certiorari petition ending any further review of Brown's conviction or sentence. *Brown v. United States*, 135 S. Ct. 489 (2014). A369; A299.

B. Brown's Initial Delaware Advancement Action and Rite Aid's Pennsylvania Action

On October 9, 2002, Rite Aid filed a writ of summons against Brown in the Cumberland County Action. A370-72; A161-63. Contrary to Rite Aid's later assertions, this writ of summons included no substantive allegations, but instead merely stated that Brown was "hereby notified that Rite Aid Corporation has commenced an action against you." A161. Rite Aid took no further action in the Cumberland County Action for more than one year.

In January 2003, nine months before Brown's criminal trial, Rite Aid ceased advancements of Brown's attorneys' fees and expenses. A323. On October 20, 2003, the Court of Chancery issued an opinion ordering Rite Aid to continue paying advancements to one of Brown's co-defendants, Bergonzi, until the final disposition of Bergonzi's case, notwithstanding the fact that Bergonzi had pled guilty to conspiracy charges. *See Bergonzi v. Rite Aid Corp.*, 2003 WL 22407303 (Del. Ch. Oct. 30, 2003); A369; A207-17. Armed with this precedent, on December 3, 2003 Brown filed an action in the Court of Chancery (the "Delaware Advancement Action") seeking an order compelling Rite Aid to resume payment of advancements until the final disposition of Brown's case. A219-27. Like Bergonzi, Brown brought his Delaware Advancement Action pursuant to Section 145 and Rite Aid's Charter. A370.

In response to Brown's Delaware Advancement Action, Rite Aid dusted off its previously ignored Cumberland County Action, filing its initial complaint on December 26, 2003. *Id.* The complaint in Cumberland County sought, among other things, damages allegedly resulting from the matters for which Brown was convicted, and to recover amounts already advanced to Brown. At the time, Brown did not know he was a Released Party under the Bar Order and that the Cumberland County Action was filed in violation of the Bar Order.

In the Court of Chancery, Brown sought to dismiss Rite Aid's Counterclaims and stay the Cumberland County Action in favor of his first-filed Delaware Advancement Action. Rite Aid argued that the Cumberland County Action was first-filed by virtue of its barebones October 9, 2002 writ of summons. As a result, the Court of Chancery stayed the Delaware Advancement Action pending resolution of the Cumberland County Action. A259-60.

With the Delaware Advancement Action safely deferred, Rite Aid allowed the illegally-filed Cumberland County Action to languish for more than thirteen years without resolution, and it remains pending today. Meanwhile, Brown's Delaware Advancement Action was dismissed by the Court of Chancery in 2008 for failure to prosecute. A377.

C. Brown's Current Indemnification Action and Proceedings Below

Faced with Rite Aid's unwillingness to resolve the Cumberland County Action, on October 8, 2015, Brown returned to the Court of Chancery pursuant to Rite Aid's by-laws that he "may apply to the Court of Chancery … for indemnification" (A029), and filed a three-count complaint seeking mandatory indemnification as to the twenty-six counts of the indictment on which he was successful on the merits or otherwise, pursuant to Section 145(c) and Article VIII, Section 5 of Rite Aid's by-laws; permissive indemnification as allowed by Rite

Aid's by-laws for the ten counts of the indictment on which Brown was convicted but acted in good faith; and an award for fees and expenses. A300-90; A440-85.

In the court below, Brown promptly moved for partial summary judgment as to liability on the mandatory indemnification count of his complaint. A391-420. Rite Aid responded by moving to dismiss the complaint as time-barred and requested the action be dismissed or stayed in favor of the still-ongoing Cumberland County Action. A002; Dkt. 9.

Rite Aid also retaliated by filing, on December 16, 2015, a motion for summary judgment in the Cumberland County Action seeking judgment against Brown in the amount of $297.4 million plus pre-judgment interest, which included amounts allegedly paid to settle the securities litigation, attorneys' fees, and other professional expenses. A435. It was only after Rite Aid sought to recover these damages relating to its civil liability in the settled securities litigation, that Brown's current counsel identified the release and injunction in the Bar Order.

Accordingly, on March 29, 2016, Brown filed in the EDPA a motion to enforce the Bar Order to prohibit Rite Aid from continuing to prosecute in the Cumberland County Action. A486-504. On June 7, 2016, Judge Stewart Dalzell granted Brown's motion and entered an order permanently enjoining Rite Aid from proceeding with the Cumberland County Action on the grounds that Rite Aid's filing of that action violated the Bar Order. A558-72.

On July 11, 2016, Judge Dalzell amended his order, clarifying that Count VIII of the Cumberland County Action, and only Count VIII, in which Rite Aid seeks a declaratory judgment, is not barred by the federal injunction. A572.1. Counts I-VII of the Cumberland County Action, which include the Count specific to Brown's right to indemnification—Count VII—remain enjoined. A236 at ¶ 37. Rite Aid did not appeal this ruling, and the time for any appeal has now expired.

On August 22, 2016, the Court of Chancery ruled in a transcript opinion that Brown's indemnification action was time-barred under the doctrine of laches. Ex. A. On August 24, 2016, the court below entered an Order and Final Judgment. Ex. B. This appeal was timely filed.

ARGUMENT

I. THE COURT BELOW ERRED BY CONCLUDING BROWN'S INDEMNIFICATION CLAIM ACCRUED ON JANUARY 10, 2011, NOT NOVEMBER 10, 2014

A. Question Presented

Whether the court below erred in concluding that Brown's indemnification claim accrued on January 10, 2011, upon the denial of his first certiorari petition, rather than on November 10, 2014, upon the denial of his second and final certiorari petition. A453; A466-69; A627-30; A633.

B. Scope of Review

"A determination of when the statute of limitations begins to run on a right to indemnification is grounded, first, in the events giving rise to the claim; and second, in the identification of what specifically identifiable event starts the statute of limitations to run, as a matter of law." *Scharf*, 864 A.2d at 916. Here, as in *Scharf*, the factual events giving rise to the claim are not in question. Since these historical facts are established, "the ultimate determination of the legal issue presented is reviewed by appellate courts *de novo*." *Id*.

C. Merits of Argument

In *Scharf*, this Court held that, "[a] cause of action for indemnification accrues when the officer or director entitled to indemnification can be confident any claim against him… has been resolved with certainty." 864 A.2d at 919 (internal quotations and citation omitted). This Court explained "[g]enerally, the

matter on which the claim for indemnification is premised may be said to have been resolved with certainty only when the underlying investigation or litigation is definitely resolved." *Id.* at 919. A two-part analysis applies to determine when the outcome of underlying litigation is certain, such that the statute of limitations on a claim for indemnification begins to run. *Id*. at 920.

"First, the underlying matter must be identified." *Id*. Here, there is no dispute that the underlying matter for which Brown claims indemnification is his criminal prosecution by the United States. "Second, the date when the outcome of that underlying matter was resolved with certainty must be determined." *Id.* Here, the court below departed from this Court's holding in *Scharf*, focusing its analysis not on when Brown could be certain his underlying criminal prosecution was resolved with certainty, but instead focusing on when the "core direct appeal" concluded. Ex. A at 6:13-14.

After concluding three years was the proper analogous statute of limitations[3], the court below reasoned:

> I believe [the claim] arose upon the denial of certiorari by the United States Supreme Court on January 10, 2011. That denial of certiorari addressed the conviction itself. That's what I think is the "action, suit, or proceeding" for purposes of Section 145 that gives rise to the right of indemnification.

[3] That conclusion was also incorrect. *See* § II, *infra*.

> The argument is made that the denial of certiorari on the collateral attack on that judgment should be the time when finality exists for purposes of the statute of limitations. Under that view, the operative date is November 10, 2014.
>
> This is something that, really, only the Delaware Supreme Court can decide. I understand the arguments that are made under *Sun Times* about what it means to have a final disposition. It's interesting what counsel has said at argument today about a 2255 motion being part of the underlying criminal proceeding as opposed to a separate criminal proceeding.
>
> My personal sense is that when we talk about "action, suit or proceeding" and the finality that exists therefrom, we're talking about the core direct appeal, and that once that happens, that action, suit or proceeding is final.
>
> My personal sense is that a collateral attack is just that: it's collateral. It's a way of trying to set aside an already final judgment. It may be that for procedural purposes, one brings that type of collateral attack in the same core proceeding, but it strikes me that that is a separate and distinct phase of the litigation, and that in terms of the right to indemnification, finality for purposes of final disposition is achieved when the original underlying criminal proceedings end. In this case, that happened on January 10, 2011.
>
> [T]hat is in some ways a policy judgment that ultimately the Delaware Supreme Court would have to make. You can make the same type of back and forth argument that was addressed in *Sun Times* as to collateral attack, to that's certainly a fairly litigable point.

Ex. A at 5:16-7:8.

The conclusion below that Brown's "original underlying criminal proceedings end[ed] … on January 10, 2011" is incorrect. *Id.* at 6:24-7:2. When Congress adopted the motion procedure codified at 28 U.S.C. § 2255, it made it clear that the procedure was "a further step in the movant's criminal case" and not

a separate action, as is the case with a federal habeas petition. Further, motion practice under Section 2255, unlike federal habeas proceedings, ***continues to address the conviction itself***, just like a direct appeal. The Advisory Committee Notes to Rule 1 of the Rules Governing Section 2255 Proceedings for the United States District Courts—rules promulgated by the U.S. Supreme Court and approved by Congress—explain:

> Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state prisoner….
>
> Whereas sections 2241-2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge "issuing the writ" as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he ***"shall discharge the prisoner or*** resentence him or ***grant a new trial*** or correct the sentence as may appear appropriate." ***This is possible because a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 USC as § 2255.*** In reporting S 20 favorably the Senate Judiciary Committee said (Sen Rep 1526, 80th Cong 2d Sess., p 2):
>
> > The two main advantages of such motion remedy over the present habeas corpus are as follows:
> >
> > First, ***habeas corpus is a separate civil action and not a further step in the criminal case*** in which petitioner is sentenced (*Ex parte Tom Tong*, 108 US 556, 559 (1883)). ***It is not a determination of guilt or innocence of the charge*** upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some

> right such as lack of counsel--has been denied ***which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial***. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 USCA, sec 461), the court or judge ***is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding*** (see *Medley*, petitioner, 134 US 160, 174 (1890)). ***For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case***. ***Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or resentence him or grant a new trial*** or correct the sentence as may appear appropriate."

28 U.S.C. § 2255, Rule 1, Advisory Committee Note (emphasis added).

In *United States v. Thomas*, 713 F.3d 165 (3d Cir. 2013), *cert denied*, 133 S.Ct. 2873 (2013), the Third Circuit Court of Appeals concluded, "it is now clear that, while civil in some respects, a Section 2255 proceeding is a continuation of the underlying criminal case." *Id.* at 173; *see also United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003)("a § 2255 motion is deemed a further step in the movant's criminal case…").[4] A motion filed pursuant to Section 2255 is "a continuation of the criminal case in the sentencing court" and by "making § 2255 proceedings a continuation of the criminal case, Congress also gave federal courts

[4] The *Fiorelli* Court recognized that, "Historically, a federal prisoner's motion to vacate, set aside, or correct a sentence, under § 2255 was considered an independent civil suit, and not a proceeding in the original criminal prosecution," but that, "Congress and the Supreme Court altered this tradition in 1976 with the adoption of the Rules Governing Section 2255 Proceedings…." 337 F.3d at 285.

broader procedural latitude than in § 2254 habeas actions." *Thomas*, 713 F.3d at 171; *see also United States v. Cook*, 997 F.2d 1312, 1319-20 (10th Cir. 1993)(holding Section 2255 proceedings are part of the underlying criminal case).[5]

The court below ruled finality occurred after Brown's "core direct appeal" had concluded, stating, "It may be that for procedural purposes, one brings [a Section 2255 motion] in the same core proceeding, but it strikes me that that is a separate and distinct phase of the litigation…."[6] Ex. A at 6:18-22. The Court expressed its "personal sense … that a collateral attack is just that: it's collateral." *Id.* However, the U.S. Supreme Court has stated expressly that, "some 'collateral' proceedings are often regarded as part of the criminal case." *Wall v. Kholi*, 562 U.S. 545, 559 (2011). The *Wall* Court included Section 2255 proceedings as one such example, explaining:

> We have said, for example, that a writ of *coram nobis* "is a step in the criminal case and not … a separate case and record, the beginning of a

[5] *But see United States v. Asakevich*, 810 F.3d 418, 423 (6th Cir. 2016) (affirming denial of a motion for extension of time to file § 2255 motion on the mistaken conclusion that there was no existing action in which to file it, that § 2255 motions "begin a new proceeding," and that there was no case or controversy in which the court could consider a motion for extension of time).

[6] As explained in *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 395-96 (Del. Ch. 2008), understanding "judicial matters ***often have several stages*** and that such matters ***are not resolved until those stages are completed or there is no further opportunity to go to another stage***, the words final disposition and action, suit or proceeding [can] have only one apparent meaning." *Id.* at 396 (emphasis added). Brown's filing of a § 2255 motion, just as his filing of a direct appeal, was "as of right." *See* 28 U.S.C. § 2255(a).

> separate civil proceeding." … But we have nonetheless suggested that *coram nobis* is a means of "collateral attack."… ***Similarly, a motion under 28 U.S.C. § 2255 (2006 ed., Supp. III) is entered on the docket of the original criminal case and is typically referred to the judge who originally presided over the challenged proceedings, see § 2255 Rules 3(b), 4(a), but there is no dispute that § 2255 proceedings are "collateral,"***....

Wall, 562 U.S. at 559-60 (citations omitted)(emphasis added). Because Brown's criminal case was not yet over, and because Brown's Section 2255 motion could have resulted in vacation of Brown's judgment of conviction or a new trial and subsequent full acquittal,[7] Brown could not be confident his criminal case was resolved with certainty until the Supreme Court refused Brown's Section 2255 appeal,[8] which occurred on November 10, 2014. A299. By holding otherwise, the court below disregarded the legal test established in *Scharf* that, "[a] cause of action for indemnification accrues when the officer or director entitled to indemnification can be confident any claim against him… has been resolved with certainty." *Scharf*, 864 A.2d at 919(internal quotations and citation omitted).

In *Clay v. United States*, the U.S. Supreme Court recognized, "[f]inality is variously defined; like many legal terms, its precise meaning depends on context." 537 U.S. 522, 527 (2003); *Jimenez v. Quarterman*, 555 U.S. 113, 119

[7] *See* 28 U.S.C. § 2255(b)(empowering the district court to, among other things, "***vacate and set the judgment aside***" or "***grant a new trial***.")(emphasis added).

[8] Brown's appeal from denial of his § 2255 motion was an appeal as of right, just as his direct appeal was. *See* 28 U.S.C. § 2255(d).

(2009)(same). While it is true the denial of Brown's first certiorari petition ended Brown's direct appeal, it also ***started*** the limited one-year period in which Brown could file a Section 2255 motion in his criminal case. Significantly, some important challenges to Brown's criminal conviction could not have been brought on direct appeal, and could only have been pursued by way of a Section 2255 motion.[9] *See Gov't of the Virgin Is. v. Lewis*, 620 F.3d 359, 371 (3d Cir. 2010)(ineffective assistance of counsel claims are generally not entertained on direct appeal, and must be brought as a collateral challenge); *United States v. McLaughlin*, 386 F.3d 547, 555 (3d Cir. 2004)(same); *United States v. Chorin*, 322 F.3d 274, 282 n.4 (3d Cir. 2003)(same). The Court of Chancery incorrectly concluded that Brown should have been confident that his criminal litigation was over when he was required to wait to file a Section 2255 motion to present his constitutional challenges, including the ineffective assistance of his trial and appellate attorneys.

The court's decision in this case is also inconsistent with *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380 (Del. Ch. 2008). There, Court of Chancery analyzed the meaning of "final disposition" of an "action, suit or proceeding"

[9] Section 2255 motions are such an integral part of the criminal appeal process that indigent defendants retain the right to appointed defense counsel for such proceedings, just as they do on direct appeal. *See* 28 U.S.C. § 2255(g); *see also Sun-Times*, 954 A.2d at 406 (noting that criminal defendant's right to appointed counsel during direct appeal was indicative of a lack of finality).

under Section 145(e). The Court of Chancery first looked to Black's Law Dictionary, which defined "final disposition" as "such a conclusive determination of the subject-matter that after the award, judgment or decision is made, nothing further remains to fix the rights and obligations of the parties, ***and no further controversy or litigation can arise thereon.***" *Sun-Times*, 954 A.2d at 392 (emphasis in original). Consistent with the rule in *Scharf*, the *Sun-Times* Court held that a determination of an officer's right to indemnification may only be determined when the underlying action, suit or proceeding "is finally resolved or disposed of, in the sense that its outcome ***is not subject to further disturbance***." *Id*. at 395 (emphasis added).

In *Sun-Times*, the court considered the oddities of Sun Times' position regarding when "final disposition" occurred by applying the defendant's position to some real-world possibilities. *Id.* at 401-04. The Court might just as easily have been describing this case. For example, suppose the U.S. Supreme Court had granted Brown a new trial on November 10, 2014, instead of denying Brown's second certiorari petition, and that Brown prevailed on all counts at his new trial. No one could dispute Brown would have been 100% successful; however, under the court's ruling, Brown would nevertheless be barred from seeking advancement for his retrial and from seeking indemnification (and would be barred from his statutory right to mandatory indemnification for his acquittal) because final

disposition, in the court's view, occurred when Brown's "core direct appeal" came to an end on January 10, 2011. In such a scenario, Brown's indemnification claims would be time-barred regardless of the successful outcome of Brown's new criminal trial. Such a result would be wholly inconsistent with this Court's reasoning in *Scharf* and Brown's statutory right to mandatory indemnification under Section 145(c), and cannot be the law in Delaware. Under *Scharf* and *Sun-Times*, Brown's indemnification claim did not accrue until November 10, 2014, because only then could Brown be confident that his criminal case had been resolved with certainty. *Scharf*, 864 A.2d at 919-20; *Sun-Times*, 954 A.2d at 403.

II. THE COURT BELOW ERRED BY DETERMINING THE ANALOGOUS STATUTE OF LIMITATIONS TO BE 3 YEARS, RATHER THAN THE CORRECT 20 YEAR PERIOD

A. Question Presented

Whether the court below erred by determining that the analogous statute of limitations for Brown's indemnification claim was the three-year period under 10 *Del. C.* § 8106, rather than the twenty-year time frame allowed under 10 *Del. C.* § 8106(c), when the contract at issue provides that a cause of action for indemnification may be brought "at any time" after a claim remains unpaid for 30 days. A463-66; A624-26.

B. Scope of Review

"The Court of Chancery's interpretation of a statute of limitations is a question of law, which [this Court] review[s] *de novo*." *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009).

C. Merits of Argument

On August 1, 2014, 10 *Del. C.* § 8106 was amended and 10 *Del. C.* § 8106(c) ("Section 8106(c)") became effective. *See* 79 Del. Laws ch. 353, §§ 1–2 (2014). Section 8106(c) now provides:

> Notwithstanding anything to the contrary in this chapter … an action based on a written contract, agreement or undertaking involving at least $100,000 may be brought within a period specified in such written contract, agreement or undertaking provided it is brought prior to the expiration of 20 years from the accruing of the cause of such action.

The synopsis of the bill that became Section 8106(c) explained:

> Subsection (c) gives clear statutory authorization to the parties' freedom to contract beyond the three or four year statutory period without resorting to the use of a sealed instrument, as long as the contract involves at least $100,000 and is in writing. Examples of a "period" that may be specified in a written contract, agreement or undertaking would include, without limitation, (i) a specific period of time, (ii) ***a period of time defined by reference to the occurrence of some other event or action***, another document or agreement or another statutory period ***and*** (iii) ***an indefinite period of time***.

Del. H.B. 363, 147th Gen. Assem. § 1 (2014)(emphasis added). The issue presented is whether Section 8106(c) applies in this case.

The pertinent contractual language applicable to Brown's indemnification claim appears in Article Tenth of Rite Aid's Charter. A011; A304-07.[10] The provision provides in pertinent part:

> (2) Right of Claimant to Bring Suit. If a claim under paragraph (1) of this Section B is not paid in full by the corporation within thirty days after a written claim has been received by the corporation, ***the claimant may at any time thereafter bring suit against the corporation*** to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim.

[10] If the General Assembly chooses to alter the statute of limitations, then the change applies not only to future claims, but also presumptively governs existing claims. *State ex rel. Brady v. Pettinaro Enters*., 870 A.2d 513, 529 (Del. Ch. 2005); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993). "[A] statutory amendment is remedial, and may apply retroactively, when it relates to practice, procedure or remedies and does not affect substantive or vested rights." *Hubbard*, 633 A.2d at 354. Statutes of limitations are procedural limitations on remedies; statutory changes to the limitations period are therefore given retrospective construction. *Id*.; *Brady*, 870 A.2d at 529.

A011 (emphasis added). Because this provision specifies an indefinite period of time within which suit may be brought following Rite Aid's failure to pay—"at any time thereafter"— the 20-year period under Section 8106(c) applies.[11]

The court below disagreed, stating:

> Under 8106(c), our law currently allows parties to expand the standard three-year period for up to 20 years by specifying in a written contract.
>
> I don't think that the certificate of incorporation does so here. This strikes me as a rather standard provision that is supposed to say that there is an initial 30-day period where people are going to try to work things out, and after that, somebody can file suit. That's all I really think it does. I don't think something of that nature, even though it contains the words "at any time," is supposed to build in a 20-year period. Nor do I think, generally speaking, that silence as to a time for filing converts things into a 20-year period.

Ex. A at 4:11-5:1. This Court has not yet interpreted Section 8106(c), however, "Delaware observes the well-established general principle that … it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement." *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

The court below, however, re-wrote the contract commenting that this is "a rather standard provision" under which "there is an initial 30-day period where

[11] The parties do not dispute that Brown's indemnification claim is a contractual claim in excess of $100,000.

people are going to try to work things out, and after that, somebody can file suit," A659, when the contractual language clearly provides that, upon non-payment of a claim for 30 days, "the claimant may at any time thereafter bring suit against the corporation…." A625. The statute contains no exception for "standard provision[s]" found in existing contracts. The statute applies to ***any*** written contract in excess of $100,000 that specifies a period within which to bring suit, ***even an indefinite period, defined by reference to the occurrence of some other event***, here the corporation's failure to pay the claim within 30 days of the demand for indemnification**.** In such a case, the clear statutory language limits to 20 years the period within which a suit must be brought.

When construing a statute, this Court has established as its standard the search for legislative intent. "Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls." *Zambrana*, 118 A.3d at 775(citing *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)). Further, "[i]t is well established that [c]ourts have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions." *Id.* (citing *Bd. of Adjustment of Sussex Cty. v. Verleysen*, 36 A.3d 326, 331 (Del. 2012)). The court's ruling that the 20-year limitation does not apply is contrary to the clear and unambiguous language in the statute, and is therefore erroneous.

III. THE COURT BELOW ERRED BY CONCLUDING THE ANALOGOUS STATUTE OF LIMITATIONS FOR BROWN'S INDEMNIFICATION CLAIM WAS NOT TOLLED BY PRIOR LITIGATION BETWEEN THE PARTIES

A. Question Presented

Whether the Court below erred by concluding the analogous statute of limitations was not tolled by Brown's 2003 Advancement Action against Rite Aid, Rite Aid's subsequent complaint filed in the Cumberland County Action against Brown, and Brown's counterclaim in the Cumberland County Action. A461-63; A630.

B. Scope of Review

The Court of Chancery's interpretation of the statute of limitations is a question of law. *Reid*, 970 A.2d at 180. Similarly, whether that statutory period has been tolled by the filing of a cause of action is a legal determination subject to *de novo* review. *Averill v. Bradley*, 62 A.3d 1223 (Table), *1, 2013 WL 603065 (Del. Feb. 15, 2013).

C. Merits of Argument

Although there is no precise definition of laches, laches generally consists of two elements: (1) unreasonable delay in bringing a claim by a plaintiff with knowledge thereof, and (2) resulting prejudice to the defendant. *Levey*, 76 A.3d at 769. In *Levey*, this Court explained that "[i]n determining whether an action is barred by laches, the Court of Chancery will normally, but not invariably, apply

the period of limitations by analogy as a measure of the period of time in which it is reasonable to file suit." 76 A.3d at 769-70. Because "the filing of an action will commence the tolling of the statute of limitations… subject to the requirement that the plaintiff diligently seek to bring the defendant into court and subject him to its jurisdiction," *Russell v. Olmedo*, 275 A.2d 249, 250 (Del. 1971), the principle of equitable tolling may in some cases extend the analogous limitations period. For example, in *Levey*, this Court found that Levey's counterclaim against Brownstone in federal court and subsequent effort to force arbitration of the action were sufficient equitably to toll the running of the analogous statute of limitations for Levey's subsequent action in Delaware against Brownstone. This Court reasoned:

> [A]llowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy. Prosecuting separate, concurrent lawsuits in two jurisdictions is wasteful and inefficient. . . . [And], the prejudice to defendants is slight because in most cases, a defendant will be on notice that the plaintiff intends to press his claims.

Levey, 76 A.3d at 772 (quoting *Reid*, 970 A.2d at 181-82). The court below refused to find equitable tolling in this case, despite a procedural history arguably more compelling for application of equitable tolling than existed in *Levey*. Ex. A at 7:12-19 ("[T]here's just some strange things going on there, and whether it was inadvertent or advertent, that seemed to me to be focused, at least in the first

instance, on advancement and other things, but I don't think it was sufficient for tolling."). The court's refusal to find equitable tolling was erroneous.

In *Levey*, equitable tolling existed for several reasons, including that "Levey timely and consistently asserted his claim in two, non-Delaware, fora within the analogous limitations period, and that his delay in filing suit in Delaware was attributable partially--but not entirely--to extraneous factors other than his own inaction." 76 A.3d at 772-73. Likewise, in this case, Brown has been attempting since December 2003 to assert his legal claims under Rite Aid's Charter, bylaws, and Section 145 to require Rite Aid to pay for his legal expenses incurred in his defense of the criminal action brought against him.

Brown first gave notice to Rite Aid of his intention to require Rite Aid to pay his legal expenses arising from his criminal defense on February 1, 2000, when Brown provided a written undertaking to Rite Aid requesting advancement of his legal expenses. Rite Aid subsequently paid Brown's legal expenses for nearly three years. Rite Aid stopped advancing fees in January 2003, nine months before Brown's criminal trial commenced. *See* A318. In December 2003, Brown initiated the Delaware Advancement Action, seeking to compel Rite Aid to resume advancements until final disposition of his criminal case. A370; A219-27. Just two months earlier, the Court of Chancery had granted similar relief to one of Brown's co-defendants, Bergonzi, Rite Aid's former CFO. A369; A207-17.

In response to Brown's Delaware Advancement Action, on December 26, 2003, Rite Aid filed its Complaint in the Cumberland County Action seeking (1) damages allegedly resulting from the matters for which Brown was convicted, and (2) to recover amounts already advanced to Brown. A370; A228-37. Specifically relevant to equitable tolling, Count VII of the Cumberland County Action alleged, "As a result of Brown's conviction, ***it has been or may now be determined that Brown is not entitled to indemnification*** under the Company's Certificate of Incorporation or Bylaws or Section 14[5][sic] of the General Corporation Law. Accordingly, Brown is obliged to repay the amounts previously advanced by the Company to defray the purported costs of his defense of the criminal investigation and Indictment." A236 at ¶ 37 (emphasis added). Rite Aid filed the same claims alleged in the Cumberland County Action as Counterclaims in Brown's Delaware Advancement Action. A370.

Brown sought to dismiss Rite Aid's Counterclaims and to stay the Cumberland County Action in favor of his first-filed complaint in the Delaware Advancement Action, but was unsuccessful. A370-74. On April 25, 2008, the Court of Chancery dismissed Brown's Delaware Advancement Action for failure to prosecute, notwithstanding that the Cumberland County Action was not yet resolved. A377. Having been unsuccessful in obtaining mandatory advancement

of defense costs in both courts, Brown then filed the claim alleged in his Delaware Advancement Action as a counterclaim in the Cumberland County Action.

Brown and Rite Aid continued to litigate the Cumberland County Action. After years of litigation, Brown's current counsel discovered the Cumberland County Action was filed in violation of the Bar Order and Brown moved in the EDPA to enforce the permanent injunction therein. A487-504. On June 7, 2016, Judge Dalzell ruled that Rite Aid's filing and pursuit of the Cumberland County Action violated the permanent injunction under the Bar Order. A558-71 (Memorandum Opinion); A572 (Order).[12] Brown's entitlement to indemnification has been the subject of Count VII of the Cumberland County Action since December 2003. That claim effectively ended only in July 2016 when Judge Dalzell enjoined Rite Aid from pursuing any indemnification claims against Brown. A572.1.

Rite Aid's Pennsylvania counsel, who represented Rite Aid in the securities litigation, and who represents Rite Aid in this action, must have known that the Cumberland County Action was filed in violation of the Bar Order, an order he

[12] Judge Dalzell subsequently modified his order allowing only Count VIII of the Cumberland County Action to survive. A572.1.

helped Judge Dalzell author just 14 months before he initiated the Cumberland County Action against Brown.[13]

While the Cumberland County Action remained pending, Brown initiated the case below against Rite Aid for indemnification in October 2015 following the Supreme Court's rejection of Brown's Petition for a Writ of Certiorari on November 10, 2014. Assuming *arguendo* that the analogous limitations period is three years, these undisputed facts establish that Brown timely and consistently asserted his claim to recover his defense costs both in Delaware, and in the Cumberland County Action, within the analogous limitations period, and that his delay in filing the instant suit in Delaware is attributable at least partially to extraneous factors other than his own inaction – including especially, Rite Aid's violation of the Bar Order.

Accordingly, equitable tolling should apply just as it did in *Levey* and *Reid.* Although the court below acknowledged "some strange things going on" with Rite Aid's Cumberland County Action (Ex. A at 7:14-15), the Court of Chancery erroneously refused to apply equitable tolling in this case.

[13] Rite Aid now claims that the illegal filing of the Cumberland County Action was simply "inadvertent." A643-44. But the very purpose of the Cumberland County Action was to prevent Delaware courts from adjudicating Brown's original advancement claim. Rite Aid succeeded in that regard for more than a decade and its "inadvertent" mistake has had enormous consequences for Brown.

IV. THE COURT BELOW ERRED BY CONCLUDING BROWN'S INDEMNIFICATION CLAIM WAS BARRED BY LACHES

A. Question Presented

Whether the Court of Chancery erred by improperly applying laches to conclude that Brown's indemnification claim was time-barred despite the existence of such unusual or extraordinary circumstances to warrant equitable departure from the statutory time period for filing an indemnification action. A453-61; A575-78; A631-37.

B. Scope of Review

Appellate courts review "the interpretation and application of legal precepts, such as the statute of limitations and the doctrine of laches, *de novo*." *Levey*, 76 A. 3d at 768 (citing *Reid*, 970 A.2d at 180, 182).

C. Merits of Argument

In *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174 (Del. 2011) ("*IAC*"), this Court held that a presence of "unusual conditions or extraordinary circumstances" can justify not applying the statute of limitations by analogy when determining whether plaintiff's delay in filing suit is unreasonable. Although "[t]here is no precise definition of what constitutes unusual conditions or extraordinary circumstances," several factors that bear on the analysis include:

1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired;

2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances;
3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction;
4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and
5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim.

IAC, 26 A.3d at 178 (formatting added); *see also Levey*, 76 A.3d at 770-72. Without consideration or discussion of these factors, the court below simply determined no "extraordinary circumstances" exist. Ex. A at 7:20-21.

This Court explained in *Levey* that the affirmative defense of laches generally "consists of two elements: (1) unreasonable delay in bringing a claim by a plaintiff with knowledge thereof, and (2) resulting prejudice to the defendant." *Levey*, 76 A.3d at 769. In its brief statement regarding this issue, the court below appears to have ignored the fact-intensive nature of a laches defense and ruled without a developed factual record, opining that it need not "reach those [factual] issues because of the [court's] statute of limitations ruling." Ex. A at 8:5-12.

Importantly, Brown was not required to ***establish*** the existence of extraordinary circumstances sufficient to defeat Rite Aid's laches defense at this stage of the proceedings; Brown was only required to ***plead*** facts from which it is reasonably inferable that extraordinary circumstances ***may*** exist. *See Reid*, 970 A.2d at 183–84 ("Unless it is clear from the face of the complaint that an

affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate.").

"An essential element for application of the doctrine of laches is a finding of unreasonable delay. Such a factual question is usually only properly disposed of by summary judgment after discovery or at trial." *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 503 (Del. 1982)(citation omitted); *see also Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *8 (Del. Ch. Mar. 22, 2004), *aff'd*, 888 A.2d 204 (Del. 2005)(laches "is generally determined by a fact-based inquiry, and therefore summary judgment is rarely granted on a laches defense."); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co*., 860 A.2d 312, 321 (Del. 2004)(reversing dismissal on limitations grounds based on "conflicting inferences of fact"). "The period of time that constitutes an 'unreasonable delay' can range from one month to many years. The length of the delay is less important than the reasons for it." *IAC*, 26 A.3d at 177. Although the court below expressed sympathy for Brown's position, it erred when it determined no unusual conditions or extraordinary circumstances exist. Nor did the court below discuss any of the five factors set out in *IAC*, each of which suggests "unusual conditions or extraordinary circumstances" do exist and that the analogous limitations period should not have been rigidly applied. *Id.*

The first *IAC* inquiry is whether Brown asserted his claim to require Rite Aid to pay his legal expenses "through litigation or otherwise," before the analogous statute of limitations expired. *Id.* at 178; *Levey*, 76 A.3d at 771. He did. As explained in Section B, *supra*, after Rite Aid stopped advancements to Brown in January 2003 (nine months before Brown's trial) and Bergonzi had successfully sued Rite Aid to require advancement of his attorneys' fees, Brown filed a similar complaint against Rite Aid on December 3, 2003 seeking the same relief. A369-70; A219-27. Rite Aid then illegally filed the Cumberland County Action, alleging in Count VII that "Brown is not entitled to indemnification" and Brown filed a counterclaim in that action seeking mandatory advancement from Rite Aid. The Cumberland County Action was pending when Brown's claim for indemnification accrued on November 10, 2014, and still has not yet reached a final disposition.

The second *IAC* inquiry is whether Brown's delay in filing suit was "attributable to a material and unforeseeable change in the parties' personal or financial circumstances[.]" *IAC*, 26 A.3d at 178. It was. Wrongfully denied of his right to mandatory advancements since January 2003, nine months before his criminal trial commenced, Brown's criminal defense lawyers, who were owed a very large sum of money by that point, presented a feckless defense. With ineffective assistance of counsel, Brown was convicted and imprisoned. Brown has been forced to marshal his limited financial resources to finance his criminal

trial, direct and collateral appeals, as well as the Cumberland County Action. Delays in bringing the instant action are attributable, at least in part, to Rite Aid's artful and successful maneuvering to avoid paying Brown's mandatory defense costs for the past thirteen years.

The third *IAC* inquiry is whether Brown's delay in filing his lawsuit was "attributable to a legal determination in another jurisdiction." *Id.* It was. Brown's Delaware Advancement Action filed in December 2003 was defeated upon the Cumberland County Court's refusal to defer to Delaware. A248-58. Brown was thereafter effectively prevented from reasserting his claims against Rite Aid for payment of his legal expenses while the Cumberland County Action remained pending. Moreover, Brown could not assess his rights to final indemnification until the U.S. Supreme Court denied Brown's second certiorari petition on November 10, 2014.

The fourth IAC inquiry is whether Rite Aid was "aware of, or participated in, any prior proceedings" against Brown. *IAC*, 26 A.3d at 178. It has. Rite Aid abruptly stopped paying mandatory advancements in January 2003, and then filed the Cumberland County Action (in violation of the Bar Order) after Brown had filed the Delaware Advancement Action on December 3, 2003. Rite Aid's tactics eliminated the value of advancements altogether, and severely prejudiced Brown's ability to defend himself both at trial and on appeal. This harmed Brown in a way

that can never be undone. There can be no reasonable dispute that Rite Aid was aware of, and participated in, prior actions against Brown in which Rite Aid's obligations to pay Brown's legal expenses were specifically raised. Rite Aid's counsel conceded this during oral argument on the motion to dismiss. A612-13.

The fifth and final *IAC* inquiry is whether there is a "bona fide dispute" as to the validity of Brown's claim in Delaware. *IAC*, 26 A.3d at 178. There is. It is clear that Brown was successful on 26 of the 36 Counts charged against him in the Criminal Action, because these 26 Counts resulted in dismissal or a verdict of not guilty. Under well-established Delaware law interpreting Section 145(c), Brown is entitled to mandatory indemnification on these Counts. *See Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974) ("The statute does not require complete success…. Claimants are therefore entitled to partial indemnification if successful on a count of an indictment, which is an independent criminal charge, even if unsuccessful on another, related count."); *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1105-11 (Del. Ch. 2012)(awarding indemnification under Section 145(c) where plaintiff was partially successful). This is sufficient to meet the fifth *IAC* factor. *See Levey*, 76 A.3d at 771.

In *Levey*, this Court found that, "four of the five *IAC* factors support[ed] a finding of 'unusual conditions and extraordinary circumstances.'" *Id.* at 772. Thus, the *Levey* Court found that "Levey's case presents the rare circumstance

where the analogous period of limitations ought not to be the measure of whether a litigant unreasonably delayed in commencing his action." *Id.* Here, all five of the *IAC* factors support a finding of "unusual conditions and extraordinary circumstances." The Court of Chancery's determination that it did not need to "reach those [factual] issues" relevant under *IAC* "because of the [Court's] statute of limitations ruling" misses the point—where the *IAC* factors indicate "unusual conditions and extraordinary circumstances" exist, "the analogous period of limitations ought not to be the measure of whether a litigant unreasonably delayed in commencing his action." *Levey*, 76 A.3d at 772.

CONCLUSION

The Court of Chancery's Final Order and Judgment should be reversed.

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